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Supreme Court of the United States

October Term, 1966

No. 719

JOSEPH BRANCH, etc., et al.,
Petitioners,

v.

WILLA JOHNSON, etc., et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

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INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina operates 169 school administrative units which are under the administration of county and city boards of education. There is a statutory system for the employment of all employees of the public school system, including teachers. The pertinent North Carolina statutes on this subject are set out in Footnote 2 of the Order of the District Court, which appears in 242 F. Supp. 721, and on p.1198 of 10 Race Relations L. R., No. 3. This public school system is provided for under Article I, Section 27, and Article IX, of the Constitution of North Carolina, as implemented by Chapter 115 of the General Statutes of North Carolina, as amended. Public school teachers under the North Carolina statute are employed for a school year only and at the end of the school year the contract time has expired, and the contract is terminated. The employing authorities may or may

not reemploy the teacher according to their judgment and discretion.

It is important, therefore, for the State of North Carolina to know whether or not it has a legal and constitutional right to enter into contracts according to this statutory plan and whether or not, after the contract has expired and terminated, the Federal Courts can compel the boards of education to enter into contracts of reemployment of a teacher irrespective of whether they wish to do so or not, or, in other words, do we have a new contractual legal system whereby the courts can compel the parties to enter into a contract or to make a new contract by order of court irrespective of the wishes of the parties? The Court will see, therefore, that this question reaches into the whole contractual system of the public schools of the State. The school authorities of North Carolina need to know if they will be subjected to litigation every time they fail to employ a public school teacher and such knowledge is essential irrespective of groups or races.

OPINION BELOW

The Opinion of the District Court of the United States for the Eastern District of North Carolina is reported in 242 F. Supp. 721.

QUESTIONS PRESENTED

1. Do the findings of fact and the order entered thereon, by the District Court, meet the clearly erroneous test required by the Federal Rules of Civil Procedure (Fed. Rules Civ. Proc. Rule 52(a), 28 USCA Cumulative Annual Pocket Part 1965)?

2. Do the Petitioners, School Committee and School Board, have a constitutional right to reemploy a teacher or not, as they choose, after the exipration of a teacher's yearly contract?

3. Has the Respondent produced sufficient evidence to

meet the burden of proof required for a showing of violation of her civil rights?

4. Does the arbitrary and capricious rule or concept apply to a situation where a teacher's yearly contract has expired and where she is complaining of a failure to reemploy?

5. What specific civil rights of the Respondent were violated in this case?

6. Does the complaint allege a cause of action showing any specific violation of civil rights of the Respondent?

ARGUMENT

I

THE PETITIONERS HAVE A RIGHT TO MAKE THEIR OWN SELECTION OF TEACHERS AND THIS IS ESPECIALLY TRUE WHERE A CONTRACT HAS EXPIRED, AND THE COURT DOES NOT HAVE A RIGHT TO COMPEL THE PETITIONERS TO MAKE A CONTRACT WITH ANY ONE TEACHER.

As heretofore stated, North Carolina employs its teachers by yearly contracts, and it is insisted by the State of North Carolina that when a contract expires it may elect to reemploy a teacher or not. The primary and gross error of the Circuit Court of Appeals consists in the fact that the Circuit Court treated the situation as if the Respondent had been removed from her teaching position for cause during the life of her contract and while it was still in force. A casual reading of the record will show that this is not true.

We do not think that the Circuit Court has a right to compel the Petitioners to make a contract with the Respondent and that this attempt to do so is a violation of the constitutional rights of the Petitioners. Contracts are made voluntarily and upon a meeting of the minds. Up to this time they have not been forced or compelled by judicial fiat.

In 16 Am. Jur 2d (Constitutional Law) p. 704, sec. 373, the Author says:

> "Although the term 'freedom of contract' does not appear in the Constitution, the right to enter into a contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth and Fifth Amendments of the Constitution of the United States. It is also safeguarded by the Constitutions of the States, and by a constitutional guaranty of pursuit of happiness. * * * Liberty of contract involves, as one of its essential attributes, the right to terminate contracts, subject only to civil liability for unwarranted termination. * * * The United States Supreme Court has stated that freedom to contract is the essence of freedom from undue restraint on the right to contract. Other courts have stated that the liberty to make a contract includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed.
>
> "The right of liberty of contract is inherent and inalienable. It belongs to every citizen by the law of the land; every man has the right freely to deal, or to refuse to deal, with his fellowmen."

On the right to terminate contracts, see Footnote 5 on p. 706 of 16 Am. Jur. 2nd. This being true neither the Legislature nor the Court can force anyone to make another contract after the original contract is terminated. For example: In STEPHENS v. HICKS, 156 N. C. 239, the Supreme Court of North Carolina says:

> "Parties are entitled to contract according to their free will. They make contracts for themselves and not by legislative compulsion. The freedom of the right to contract has been universally considered as guaranteed to every citizen."

And the Supreme Court of North Carolina again says at the top of p. 245, in the same case, the following:

> "It may do many things with reference to contracts, but it cannot make a contract between parties, because a contract implies volition and the agreement of two or more minds to one and the same thing; in other words, consent. The Legislature can no more make a contract for parties without their consent than it can take away a vested right or impair the obligation of a contract already made."

If it is true that the Legislature cannot force persons to make contracts, it is also true that the courts will not compel parties to make contracts against their will (MONROSA v. CARBON BLACK EXPORT, INC., 359 U. S. 180, 3 L. ed. 2d 723, 79 S. Ct. 710; MEMPHIS & L. R. R. CO. v. SOUTHERN EXPORT, 117 U. S. 1, 29 L. ed. 791, 6 S. Ct. 542.

In MEMPHIS & L. R. R. CO. v. SOUTHERN EXPORT, supra, this Court said:

> "The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the Railroad Companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; *nor by making new contracts, because that is not within the scope of judicial power.*" (Emphasis ours)

In the Case of SHELTON v. Tucker, 364 U. S. 479, 81 Ct. 247, 5 L. ed. 2d 231, this Court declared unconstitutional certain Arkansas statutes requiring teacher personnel and others to submit an affidavit listing all the organizations to which each one belonged at the time or had belonged to in the last five years. There were also other provisions which made it unlawful to employ a member of the NAACP. It is quite evident that Arkansas wanted to employ these people but was prohibited by the statute in many cases from so

doing. The 3-Judge Court, on the question of employing a person after the contract had expired, said:

> "It does not follow that this Court, as a court of equity, can compel any school board to hire a person as a teacher, or to retain him in its employment, or to forbid it to discharge him. This is true because of a well settled principle that an equity court, at least in the absence of a statute or of a situation where an employee has a vested right to or interest in his employment, will not interfere by injunction with the power of an employer to determine whom he will employ or retain in his employment. As we have seen, school teachers in Arkansas have no vested rights in their jobs, and no right of reinstatement if wrongfully discharged. If a teacher is discharged in violation of his contract, his remedy is an action for damages."

This Court recognized the right of Arkansas to terminate employment and commented:

> "Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year may terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain."

II

THE CIRCUIT COURT DID NOT GIVE ANY EFFECT TO THE FINDINGS OF FACT MADE BY THE DISTRICT JUDGE NOR TO THE RULE THAT SUCH FINDINGS OF FACT SHOULD NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS, AND DUE REGARD AS TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE THE CREDIBILITY OF THE WITNESSES.

A reading of the record will show that none of the Petitioners knew anything about the Respondent's civil rights activities. Another colored teacher who engaged in demonstra-

tions was reprimanded by the Superintendent but not because of demonstrations or civil rights activities but because of the scanty clothes she wore while demonstrating. This teacher was reemployed, and, in fact, the Respondent was reemployed for the preceding year at which time she had been engaged in civil rights activities. If the Court will take the time to go through the record it will see that the District Judge is correct when he said (242 F. Supp. 721, 729):

> "Not one of the members of the Committee knew of her as an active civil rights participant. She does not appear to have been one. They did know the activities of her husband and father and uncle, and they do not appear to have associated the name of Reed Johnson with that of the teacher Willa Johnson."

The Court further found (p. 731) that if the Committee had known of the civil rights activities of Respondent the Committee would have been entirely justified in not reemploying her, it having been made to appear that she was insubordinate and uncooperative with her immediate supervisor, Principal Williams. The truth of the matter, as is plainly shown by the evidence of the colored Principal, the Respondent continually violated rules and regulations and this colored Principal had put up with her as long as he could; his patience was exhausted. The Respondent has invoked the civil rights statutes in an effort to take revenge on the School Committee.

It is provided by Rule 52 of the Federal Rules of Civil Procedure (28 USCA, Rule 52—1965 Cumulative Annual Pocket Part) that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

We do not wish to belabor the point but the Trial Judge had an opportunity to see the demeanor of all witnesses, and certainly there is substantial evidence to support every finding of the District Court. A heavy burden is imposed on those who seek to demonstrate that findings of fact of a trial court

are clearly erroneous (BELLEVUE GARDENS, INC., v. HILL, 297 F. 2d 185—1961). Certainly it must be clearly shown that findings are without adequate evidentiary support in the record or were induced by an erroneous view of the law (CEDILLO v. STANDARD OIL CO. OF TEXAS, 291 F. 2d 246, cert. den 368 U. S. 955). It is also true that a court of appeals will not substitute its judgment for that of trial court where the fact finding process is involved (MONROE AUTO EQUIPMENT CO. v. SUPERIOR INDUSTRIES, INC., 332 F. 2d 473, cert. den. 379 U.S. 901—1964).

While it is true that findings cannot be based on speculation and conjecture, nevertheless, findings as to intent, motive, purpose or design are not to be tried de novo but such findings are to be reviewed by the same standards supplied in reviewing other facts (UNITED STATES v. BOARD OF EDUCATION OF GREENE COUNTY, MISS., 332 F. 2d 40 - 1964).

It is also said in substance that an appellate court should take the view of the evidence tending to support the findings and conclusions of the trial court in a case tried without a jury in the same manner as it would consider such evidence as tending to support the verdict of a jury (MINNESOTA AMUSEMENT CO. v. LARKIN, 299 F. 2d 142 - 1962).

III

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

The Court will see that the Complaint alleges everything in conclusional form without alleging what constitutional rights have been violated because the contract of the Respondent was not renewed. It does not allege what State law under the color of which the Petitioners acted. We are not told the custom or policy of the Petitioners that resulted in an invasion of Respondent's rights. We are not told what acts of the Petitioners were arbitrary, capricious and malicious. Respondent alleges that she was not again employed because of a plan, agreement and conspiracy entered into by

the Petitioners but we do not know the primary phases of the conspiracy and plan or what Petitioners entered into the plan, nor are we told the contents of this scheme or plan. The pleadings do not tell us what overt acts were committed as a result of the conspiracy and with a design to carry out and consummate the objectives of the conspiracy.

The matter of loose and broad language and allegations in the form of generalities has been dealt with many times by the circuit courts: POWELL v. WORKMEN'S COMPENSATION BOARD OF NEW YORK, CA-2, 327 F. 2d 131, 137; McGUIRE v. TODD, CA-5, 198 F. 2d 60, 63; SNOWDEN v. HUGHES, 321 U. S. 1, 88 L. ed. 497, 64 S. Ct. 397.

IV

THE RESPONDENT HAS NOT BEEN DEPRIVED OF ANY EQUAL RIGHTS, EQUAL PROTECTION OF THE LAW OR PRIVILEGES AND IMMUNITIES PROTECTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The privileges and immunities guaranteed by the Constitution are set forth in the Slaughter-house Cases, 16 Wall. (U. S.) 36, 74, 79, 21 L. ed. 394, 408, 409. It is quite clear that none of the allegations of the Respondent fall within the purview of 42 USCA 1985, and for this, see the Case of WALKER v. BANK OF AMERICA, CA-9, 268 F. 2d 16, 24. And, as will be seen from the various cases, the right of employment in its redress is within the domain of the State (FERRER v. FRONTON EXHIBITION CO., CA-5, 188 F. 2d 954; LOVE v. CHANDLER, CA-8, 124 F. 2d 785; CHARTER v. SHAFFER, CA-3, 181 F. 2d 765; BROOKS v. SCHOOL DISTRICT OF CITY OF MOBERLY, CA-8, 267 F. 2d 733.

V

THE ARBITRARY AND CAPRICIOUS RULE WOULD NOT APPLY WHERE A CONTRACT HAS BEEN TERMINATED AND AN OFFICIAL

BOARD HAS DISCRETION IN RENEWING THE SAME.

As we have pointed out before, the Respondent's contract had terminated and we again emphasize that she was not removed from employment during the term or life of any contract. School officials in performing their duties are not liable for mere errors of judgment and have a qualified immunity from suits under the Civil Rights Statutes. This is pointed out by Chief Judge John J. Parker of the Fourth Circuit in the Case of PAPAGIANKIS v. THE SAMOS, 186 F. 2d 257. The District Court in this case lays down the same rule citing BROOKS v. SCHOOL DISTRICT OF THE CITY OF MOBERLY, 267 F. 2d 733; CHARTER v. SHAFFER, 181 F. 2d 764; HOPKINS v. WASSON, 227 F. Supp. 278, and see also HOFFMAN v. HALDEN, 268 F. 2d 280; NORTON v. McSHANE, 332 F. 2d 855, Footnote 9.

In the Case of PAPAGIANKIS v. THE SAMOS, CA-4, 186 F. 2d 257, Chief Judge John J. Parker, of the Fourth Circuit, considered this question, and said:

> "In exercising the functions of his office the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the power and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. * * * But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals."

There are many cases on this subject, and we refer the Court to the cases hereinafter cited, as showing that discretionary officials cannot be punished when they act within

the powers of a statute in discretionary matters, as follows: COBB v CITY OF MALDEN, CA-1, 202 F. 2d 701, p. 706; NELSON v. KNOX, CA-6, 256 F. 2d 312; THOMPSON v. BAKER, 133 F. Supp. 247; NORTON v. McSHANE, CA-5, 332 F. 2d 855, footnote 9; KOCH v. ZUIEBACK, 194 F. Supp. 651; EGAN v. CITY OF AURORA, 291 F. 2d 706; HOFFMAN v. HALDEN, 268 F. 2d 280; BROOKS v. MOBERLY, 267 F. 2d 733, 739.

VI

THE RESPONDENT NEVER DID PRODUCE SUFFICIENT EVIDENCE TO MEET THE REQUIRED BURDEN OF PROOF.

It is not enough for the Plaintiff to allege in a conclusional manner a deprivation of civil rights then say she is entitled to judgment. This is supported by several of the federal cases (ACKER v. SCHULTE, 74 F. Supp. 683; MITCHELL v. WRIGHT, 69 F. Supp. 698; BOXRUD v. RONNING MACHINE CO., 164 F. 2d 996; MIDDLETOWN TRUST CO. v. BREGMAN, 174 A. 67 - Conn.).

The same rule prevails in the jurisdiction of the State of North Carolina (JOHNSON v. JOHNSON, 229 N. C. 541; KNIGHT v. THE ASSOCIATED TRANSPORT, INC., 257 N. C. 758).

The presumption of discrimination as set forth in the cases dealing with discrimination in the organization of grand juries do not apply in this case, and the presumption that arises in the jury cases only arises after certain definite facts are shown. A discriminatory purpose is not presumed (TARRANCE v. FLORIDA, 188 U. S. 519, 520, 47 L. ed. 572, 573, 23 S. Ct 402).

For cases in which Respondent has failed to meet the burden of proof, see: BROOKS v. SCHOOL DISTRICT OF MOBERLY, 267 F. 2d 733; 740; MORRIS v. WILLIAMS, 59 F. Supp. 508; U. S. v. TARUMINZ, 242 F. 2d 191, 193; BARISTA v. WEIR, 225 F. Supp. 619).

VII

THE OPINION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THE CASES IN THE OTHER CIRCUITS DEALING WITH SIMILAR REEMPLOYMENT SITUATIONS.

We do not believe that Respondent has cited a single case dealing with a reemployment situation that supports her position. On the contrary, the Petitioners are supported by several cases on the subject, some of which are cited by the District Court in its Opinion in this case, such as: HENRY v. COAHOMA COUNTY BOARD OF EDUCATION, 8 Race Relations L. R. No. 4, p. 1480; UNITED STATES v. BOARD OF EDUCATION OF GREEN COUNTY, MISS., 332 F. 2d 40; GOODE v. BOARD OF EDUCATION FOR THE COUNTY OF SUMMERS, 8 Race Relations L. R., No. 4, p. 1485.

In addition to the cases cited by the District Court, there are other cases which support the view of the Defendants, as follows: FRANKLIN, et al. v. COUNTY SCHOOL BOARD OF GILES COUNTY, 10 Race Relations L. R., No. 2, p. 735; PARKER v. BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, 348 F. 2d 464, 237 F. Supp. 222 (Fourth Circuit); BUFORD v. MORGANTON CITY BOARD OF EDUCATION, 244 F. Supp. 437; BARON v. O'SULLIVAN, 258 F. 2d 336; STARLING v. BOARD OF EDUCATION FOR COUNTY OF MINGO, 175 F. Supp. 703; MORRIS v. WILLIAMS, 59 F. Supp. 508; CHAMBERS v. HENDERSONVILLE CITY BOARD OF EDUCATION, 245 F. Supp. 759.

CONCLUSION

The decision of the Circuit Court of Appeals utterly disrupts the contract system for teachers in the public schools. Under that decision Petitioners are compelled to make a contract, and may we ask for how long and for what period of time are we compelled to make this contract? Are

the Petitioners supposed to retain the services of the Respondent for the rest of her natural life? The Court does not say or give us any guide on this subject. Do we now have a new system of federal judicial tenure although we have never enacted a tenure system by our own statutes? Is the County Attorney to be held in this case although he had nothing to do with the school business whatsoever? These and many other questions are presented by this decision which did not follow the findings of fact of the District Judge. To support the decision of the Circuit Court of Appeals for the Fourth Circuit destroys the right of contract.

Respectfully submitted

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